47 ATTORNEY REPRESENTATION IN DISSOLUTION OF MARRIAGE

Adopted February 26, 1972.
Addendum issued 1995.

Syllabus

A lawyer may no more ethically represent both parties to an action under the Colorado Uniform Dissolution of Marriage Act than he can in any other matter. In most dissolutions of marriage, the parties, even though they may not then be aware of it, will have conflicting interests on matters such as property, support, custody, or spousal maintenance. In some cases where no interests of the parties are conflicting, a lawyer may represent both parties; however, in the event conflicting interests develop after such dual representation has commenced, the lawyer must withdraw entirely from the case and thereafter decline to represent either party.

Facts

The Colorado General Assembly has enacted the Uniform Dissolution of Marriage Act. 1971 Session Laws, Chapter 130. The underlying purposes of the Act are the promotion of amicable settlements to disputes between the parties to a marriage, the mitigation of potential harm to the parties to a marriage and their children arising from the process of legal dissolution, and the modification of the law to render more effective the process of dissolution by making "irretrievable breakdown" the sole basis for dissolution.

The Act, while softening the nature of divorce, or dissolution, does not eliminate the adversary nature of the proceedings insofar as property, support, custody, and spousal maintenance are concerned.

Citing the new Act, the Family Law Section of the Colorado Bar Association poses the question: Can an attorney represent both parties to a marriage in a dissolution proceeding; and if other issues such as disposition of property and child custody are present or arise, can the attorney represent both parties to the action, particularly when contested issues develop after the proceedings have been initiated?

Opinion

The Colorado Uniform Dissolution of Marriage Act renders moot ethical problems of collusion which existed under the prior law which required the proof of fault before a marriage could be terminated. See ABA Formal Opinion No. 245.

In addition, the new Colorado Act declares that it is in the public interest to promote the amicable dissolution of marriages. Conceivably, this policy can, in some cases, be promoted through the use of a single attorney to represent both parties. DR 5-105 provides, in part: ". . . a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

This rule allows an attorney to represent both parties to the dissolution proceeding in some cases. It is clear, however, that in most cases conflicting interests are involved or are potentially involved and, consequently, three Canons of the Code of Professional Responsibility are apposite. Canon 4 states, "A lawyer should preserve the confidences and secrets of a client." Canon 5 provides, "A lawyer should exercise independent professional judgment on behalf of a client." Canon 7 requires, "A lawyer should represent a client zealously within the bounds of the law."

EC 5-15 provides: "If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in liti-

gation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardships on the clients; and for this reason it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients."

Since conflicting interests will nearly always exist with regard to matters of property, support, custody or maintenance, whether or not one or both clients know or agree that their interests are conflicting, an additional ethical problem exists when a single lawyer attempts to or has attempted to represent both parties to the dissolution proceedings. Any consultation between the parties and their attorney is privileged whether or not a fee is paid. *Wigmore on Evidence,* 3rd ed., vol. 8, §§ 2290-2329. When a lawyer's advice is sought he becomes immediately and ethically bound to preserve the confidence and secrets of the client or clients. Canon 4, Code of Professional Responsibility. DR 4-101(A) states:

"Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

EC 4-5 provides: "A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes."

The obligation to preserve confidence and secrets of a client continues after the termination of the employment. EC 4-6. This fact, coupled with the ethical obligation to zealously represent a client, renders unethical any attempt by a lawyer to represent or continue representation of either party to a dissolution of marriage proceeding after conflicting interests appear with regard to any relevant matter between them. It follows that no lawyer should undertake or continue to represent both parties to a dissolution proceeding when any conflicting interest exists or develops concerning any aspect of the dissolution proceeding.

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 1.6(a) (regarding confidentiality); Rules 1.7, 1.8(b) and (f), 1.9(c) (regarding conflicts of interest); and Rule 1.16 (a) and (d) (regarding declining or terminating representation). There is new language in Rule 1.7(c) which should be considered in connection with the possibility of client waiver in conflict situations.

The Ethics Committee directs attorneys to Opinion 68 and the relevant provisions of the Colorado Rules of Professional Conduct contained in that opinion. This opinion is supplemented by Opinion 68 which should be reviewed in conjunction with the Rules.